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No. 09-108

Supreme Court, U.S.
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In The
Supreme Court of the United States

LAWRENCE PATRICK DAVIS,

Petitioner,

vs.

TARRANT COUNTY, TEXAS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT TARRANT COUNTY

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit's decision relative to standing is in conflict with any Supreme Court or other circuit's opinion.

2. Whether denial by state district judges of the application of an attorney to be included on the list of those receiving court appointments in criminal cases is a "judicial act" for which the district judges are entitled to absolute immunity.

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STATEMENT OF THE CASE

Petitioner alleges that the denial of his application for admission to the list of attorneys receiving felony court appointments was in violation of his procedural and substantive due process rights as well as a violation of the Constitution's equal protection clause. U.S. CONST. amend. XIV, § 1. He brought suit against the state district judges[1] who denied his application; additionally, Petitioner brought suit against Tarrant County, Texas, alleging that the district judges were county policymakers. The Fifth Circuit Court of Appeals held that the district judges' acts in formulating and implementing the court appointment plan were judicial acts entitled to absolute judicial immunity and that they acted, not on behalf of Tarrant County, but rather for the State of Texas.

1. Petitioner, a lawyer licensed by the State of Texas, applied for admission to the list of attorneys who receive court appointments to represent indigent defendants charged with a felony in Tarrant County. Petitioner's application was denied by the district judges. Petitioner filed suit against the district judges and Tarrant County for this denial, alleging that the actions of the district judges constituted policies of Tarrant County because the relevant statute provides for the adoption of procedures "countywide." *See* TEX.

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[1] The state district judges who are respondents in this matter will hereafter be referred to as "the district judges."

CRIM. PROC. CODE ANN. § 26.04 (a) (Vernon 2009). Petitioner claimed that despite having satisfied all objective qualifications adopted by the district judges, he had nevertheless been denied court appointments. He attributed this denial to an allegedly improper subjective component in the application process. According to Petitioner's legal theory, such a subjective component is statutorily prohibited; under his view of the law, if a lawyer has satisfied the objective credentials, his admission to the appointment list should be a mere ministerial act of the district judges.

The relevant statutory authority is centered upon the Texas Fair Defense Act, which the Texas Legislature passed in 2001. *See* 77th Leg., R.S., Ch. 906, 2001 TEX. GEN. LAWS 906. That Act formalized the procedures for appointment of counsel to indigent defendants. It provides guidance for judges to effectuate the appointment of counsel, both for the benefit of indigent defendants and for those attorneys receiving appointments.

2. The application process in Tarrant County is conducted annually. Petitioner's application in 2005 was denied. In 2006, Petitioner refused to apply, alleging that a component of the application required a waiver of his substantive due process rights. This refusal prevented Petitioner from acquiring the necessary standing to make any claim relevant to a denial of his application in 2006. The Fifth Circuit agreed and rejected Petitioner's implied argument of futility, because it was based upon no more than mere speculation or surmise. (Pet. App. 1-30)

Additionally, the district judges and Tarrant County defended against Petitioner's claims at the United States District Court and Fifth Circuit Court of Appeals on the basis that the decisions of the district judges were judicial in nature and, consequently, the district judges were entitled to absolute immunity. Also, these judicial acts were performed by the district judges on behalf of the State of Texas and not the county in which their courts were geographically located. A municipality is liable only for the acts of its own policymakers.

3. The U.S. District Court granted the district judges' and Tarrant County's motions to dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure. (Pet. App. 31-44) The U.S. District Court recognized that the district judges were acting within their judicial capacity at all times relevant to Petitioner's claims. (Pet. App. 38-41) The U.S. District Court further found that the policies and procedures adopted by the district judges represented those of the State of Texas and not of Tarrant County (Pet. App. 42-43), citing prior Fifth Circuit precedent in *Hamill v. Wright*, 870 F.2d 1032 (5th Cir. 1989), which stated that "Texas district judges act for the state in appointing counsel for indigent criminal defendants, and the county is not responsible under § 1983 for their actions in this regard." *Id.* at 1037.

The Fifth Circuit affirmed the dismissal, agreeing with the U.S. District Court, by holding that "the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court

appointments" was "clearly a judicial act." *Davis v. Tarrant County*, 565 F.3d 214, 226 (5th Cir. 2009). (Pet. App. 24) Because compiling the list "is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case," the court held that the district judges were protected by absolute immunity. *Id.* Moreover, the Fifth Circuit found that Petitioner lacked standing for any claims connected to a denial of court appointments in 2006 because he failed to submit an application. (Pet. App. 12)

REASONS FOR DENYING THE WRIT

Petitioner has made no competent argument to support the jurisdiction of this Court.

- First, relative to the issue of standing, Petitioner alleges a conflict between decisions of the Supreme Court and the Fifth Circuit, based upon a misunderstanding of the cases.

- Second, the Fifth Circuit's holding that the acts of the district judges were judicial in nature and were protected by judicial immunity is consistent with this Court's decision in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988), and similar decisions by

other courts of appeal.[2] Any conflict is found merely within the facts of each case, not in any jurisprudential disagreement.

I. Whether the Fifth Circuit's decision relative to standing is in conflict with any Supreme Court or other circuit's opinion.

The appellate court's observation that Petitioner "[did] not clearly articulate his response to the . . . standing argument," could be applied equally to Petitioner's initial argument in his Petition for Writ of Certiorari. (Pet. App. 11) Whether the cause of action is one for damages or declaratory relief, the requirements of Article III standing are axiomatic. To present a justiciable claim there must be a firm "case or controversy;" this is established through the satisfaction of three criteria: an injury in fact, causation, and redressability.

These elements are the "irreducible constitutional minimum" and apply equally to suits brought pursuant to the Declaratory Judgment Act and those brought for monetary damages. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Petitioner's own authority, *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001), states that the

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[2] *Sparks v. Character & Fitness Comm.*, 859 F.2d 428 (6th Cir. 1988); *Roth v. King*, 449 F.3d 1272 (D.C. Cir. 2006); *Smith v. City of Hammond, Indiana*, 388 F.3d 304 (7th Cir. 2004).

Declaratory Judgment Act "does not jettison traditional standing requirements."

Neither the decision below nor the record raises the question that Petitioner proposes in his Petition for Writ of Certiorari. The Fifth Circuit's decision in the present case makes clear that Petitioner's failure to submit a 2006 application precludes standing. To possess the requisite standing "a plaintiff generally must submit to the challenged policy before pursuing an action to dispute it." *Davis*, 565 F.3d at 220. The appellate court inferred, *sua sponte*, a futility argument on Petitioner's behalf. (Pet. App. 11-12) Rejecting the futility defense, the appellate court noted the string of decisions across multiple circuits that address the futility exception for general standing requirements. Petitioner makes no contention in his Petition for Writ of Certiorari that he is excepted from the mandatory standing requirement due to futility.

Petitioner argues instead that the Fifth Circuit's decision conflicts with its own decision in *Okpalobi v. Foster*, and this Court's decision in *Lujan*. Any attempt to contrast the Fifth Circuit's decision in the present case with these two cases is inapposite; they are only related on basic elements of standing. Neither *Okpalobi* nor *Lujan* addressed the futility exception to Article III standing requirements upon which the Fifth Circuit based its decision.

Petitioner also cites this Court's decision in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461,

81 L.Ed. 617 (1937), but provides no real context for its invocation. Tarrant County assumes that Petitioner is suggesting that the Fifth Circuit erred in not considering his claim with a more relaxed standing requirement for "controversies" seeking declaratory relief. Chief Justice Hughes, writing for the unanimous Court in *Aetna Life*, maintained, however, that jurisdiction is only found in cases that have "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life*, 300 U.S. at 241, 57 S.Ct. at 464. Utilizing this opinion as support for Petitioner's justification of certiorari is misplaced. The standing principles stated by this Court in *Aetna Life* are not inconsistent with the Fifth Circuit's decision in the present case. Petitioner's failure to apply for appointments in 2006 reduces his claim to one of mere speculation and surmise and requires the analysis of the "hypothetical state of facts" lamented by this Court.

There is no conflict between the Fifth Circuit and this Court on the point of standing. Petitioner merely disagrees with the Fifth Circuit's decision. And this Court does not sit to merely correct such errors by an appellate court.

II. Whether the denial by state district judges of the application of an attorney to be included on the list of those receiving court appointments in criminal cases is a "judicial act" for which the district judges are entitled to absolute immunity.

1. Despite the appellate court's statement that they "disagree with the [Second Circuit] *Mitchell* court," this does not reflect the type of "square and irreconcilable conflict" that is appropriate for justifying this Court's jurisdiction. R. Stern, E. Gressman, S. Shapiro, K. Geller, Supreme Court Practice 226 (8th ed. 2002). The disagreement reflects the distinguishing factual nature of the case and not a fundamental and irreconcilable disagreement of the law.

In *Mitchell v. Fishbein*, 377 F.3d 157 (2d Cir. 2004), the Second Circuit analyzed the system of appointing counsel to indigent defendants established by the Legislature of the State of New York.[3] The system delegated the rulemaking authority for the administration of the plan to the local Appellate Division of the judiciary. Pursuant to that authority,

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[3] The New York State law required "the governing body of each county and the governing body of the city . . . [to] place in operation throughout the county a plan for providing counsel to persons charged with a crime . . . who are [indigent]." *Mitchell*, 377 F.3d at 160. The plan at issue in *Mitchell* required the Bar Associations to prepare and certify a list of attorneys and authorized the Appellate Division of the New York Supreme Court to promulgate the necessary rules for the administration of the plan. *Id.* at 161.

the Appellate Division established a Central Screening Committee to compile a list of attorneys who were willing and qualified to receive court appointments.[4]

The plaintiff, an attorney licensed by the State of New York, was denied recertification for the list, effectively depriving him of the receipt of court appointments, and he consequently filed suit against the members of the Central Screening Committee. The plaintiff was not, however, removed from any matter under which representation had already begun. The committee's decisions had no impact on any particular case.

The Second Circuit held that because the committee's acts were not precisely analogous to those of a judge, nor were the committee's acts integrally related to a particular "case or controversy," the committee was not entitled to the absolute immunity that may shield quasi-judicial actors. Noting the legislative prerogative present, the Second Circuit held: "The mere presence of the Appellate Division in this chain does not transmute the obligation imposed by the Legislature on the City into an inherent power of the judiciary." *Id.* at 169. According to the Second Circuit, the actions of the committee were more a function of organizing the method of payment for court appointments, not the appointment power that

[4] The members of this Central Screening Committee are the relevant defendants at issue in the *Mitchell* decision.

is inherent to the judiciary. *Id.* "For an attorney appointed to represent an indigent defendant, the difference between being on [the list of appointees] and not being on such a [list] is simply the difference between being entitled to publicly funded compensation and not being entitled to such compensation." *Id.* This contrasts sharply with the broad authority afforded to the judiciary at issue in the present case.

The distinguishable factual basis for the Second Circuit's decision in *Mitchell v. Fishbein* defeats Petitioner's claim of a circuit conflict. In the present case, the legislative authority that grants the district judges the authority to create and implement a system for court appointments bears no similarity to the New York Legislature's provisions in *Mitchell*.

The Texas Legislature passed the Texas Fair Defense Act in 2001. That Act formalized the procedures for appointment of counsel to indigent defendants. It provided guidance for judges to effectuate the appointment of counsel, both for the benefit of indigent defendants and for those attorneys receiving appointments. Specifically, the Fair Defense Act provides:

> The judges of the . . . district courts trying cases in each county, by local rule, shall adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant. . . . A court shall appoint an attorney from a public appointment list using a system of rotation. . . . The court shall appoint attorneys

> from among the next five names on the appointment list in the order in which the attorneys' names appear on the list . . .

TEX. CRIM. PROC. CODE ANN. § 26.04(a) (Vernon 2009).

Unlike the New York legislation in *Mitchell*, the provisions of the Fair Defense Act did not impose any obligations – other than funding – on any entity other than the judiciary.

The acts by the Central Screening Committee in *Mitchell* and the acts by the state district judges in the present case illustrate the dichotomy present in the functional approach articulated by this Court in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). As the Fifth Circuit stated:

> that the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case, which is clearly a judicial act, and therefore that the judges' acts at issue in this suit must be considered to be protected by judicial immunity.

Davis, 565 F.3d at 226.

2. The factual distinctions, however, need not come only from a comparison of Second Circuit and Fifth Circuit decisions; the Second Circuit has produced similarly distinctive opinions of its own on this issue. On August 28, 2009, the Second Circuit issued its decision in *Bliven v. Hunt*, 579 F.3d 204 (2d Cir.

2009). In *Bliven*, the Second Circuit rejected the plaintiff's attempt to employ the decision in *Mitchell* to breach the defendant judges' absolute immunity. The plaintiff – a city public defender – sued a trio of judges alleging an improper reduction of fees submitted for compensation.

In distinguishing the facts, the Second Circuit elucidated the basis for its decision in *Mitchell*, stating that the committee's functions were not integrally related to any specific judicial proceeding. Unlike the committee in *Mitchell*, whose acts were not integral to any specific case, the trio of judges in *Bliven* made decisions regarding the appropriateness of compensation vouchers for specific cases; a similar factual distinction that is present when *Mitchell* is contrasted with the case at bar. The present case is no more in conflict with *Mitchell* than *Mitchell* is with its fellow Second Circuit decision in *Bliven*.

3. Both the Second Circuit's decision in *Mitchell v. Fishbein* and the Fifth Circuit's decision in the present case are derivatives of this Court's decision in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). In *Forrester*, Justice O'Connor, writing for the Court, noted the difficulties that "have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges." *Forrester*, 484 U.S. at 227, 108 S.Ct. at 544. Both the Second and Fifth Circuits employ the same functional approach described by Justice O'Connor; an approach necessary because

there is no "precise and general definition of the class of acts entitled to immunity." The circuits have successfully drawn distinctions between judicial acts and acts that are undertaken by a judge in another capacity. They have done so based upon the specific facts presented to them. And they have done so in a way that is not legally contradictory but distinct, based upon the facts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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